IN THE COURT OF APPEALS OF IOWA

No. 2-1191 / 12-0715
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH ANTHONY ALEXANDER JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Joseph Alexander Jr. appeals from his conviction for assault with a dangerous weapon, in violation of Iowa Code section 708.2(3) (2011). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Teresa M. Baustian, Assistant Attorney General, John Sarcone, County Attorney, and Olu Salami, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

The fighting question in this appeal is whether a wooden cane swung like a baseball bat at the victim's head constituted a dangerous weapon as defined in Iowa Code section 702.7 (2011). The district court instructed the jury that a dangerous weapon is "any sort of instrument or device actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death." On appeal from his conviction for an aggravated misdemeanor assault, Joseph Alexander Jr. alleges his trial counsel was ineffective for not challenging the sufficiency of the State's proof the cane qualified as a dangerous weapon and for not asking the court to define "serious injury" as used in the dangerous weapon instruction.

Because the State offered proof of the violent manner in which Alexander wielded the cane, and because the jury could infer from the victim's injury that the cane was capable of inflicting death, we find no prejudice resulted from counsel's failure to raise a substantial evidence challenge to the dangerous weapon element of the assault. We likewise find no reasonable probability of a different outcome had counsel asked for an instruction defining "serious injury." Accordingly, we affirm Alexander's conviction for assault with a dangerous weapon, in violation of Iowa Code section 708.2(3).

I. Background Facts and Proceedings

During the afternoon of September 7, 2011, Alexander was socializing with his friends Tony Thomas and Sharon Hickem at Prospect Park in Des Moines. Around 4:30 or 5:00 p.m., Lawrence Gordon and his friend Cindy Biddle

drove together to the same park to relax after work. Gordon and Alexander had been friends, but were on bad terms after Alexander called Gordon a "snitch."

The witnesses provided varying accounts of the encounter between Alexander and Gordon at the park. Gordon testified he, Biddle, and another friend sat in lawn chairs and drank a few beers as Alexander and his companions remained roughly two-hundred feet away. After ten or fifteen minutes, Alexander drove his car toward Gordon's group. Thomas and Hickem followed in their own car. When Hickem waved to Gordon, Gordon waved back. Gordon then walked to Hickem's window and bent down to greet her. At this point, Gordon recalled Alexander getting out of his car "with his fists balled up" and walking toward him "very aggressively." Gordon asked Alexander "what his problem was," and Alexander replied: "You fucking snitch."

Gordon's friend Biddle realized the volatility of the conversation and told Alexander to "leave us alone." When Gordon advised Biddle to return to their truck, she began to walk away, hoping Gordon would follow. She turned in time to see Alexander with a cane in his hand. She testified: "[H]e had it back like you would a baseball bat. He took a couple of steps toward [Gordon] and then swung as hard as he could." Gordon testified he did not see the blow coming: "[T]he minute I turned around, I was struck in the face with a wooden cane." Because Alexander was not holding his cane when he initially confronted Gordon, Gordon presumed Alexander went back to his car to retrieve the cane.

Biddle believed Gordon was dazed by the blow because he tried to enter the driver's side of the truck. Biddle recalled "there was a lot of blood." She

drove Gordon to the hospital emergency room. Both Gordon and Biddle denied having physical contact with Alexander before Alexander struck Gordon with the cane.

Hickem, testifying for the defense, told a different version of the events. She said when Gordon and Biddle arrived at the park, they pulled within a few feet of Alexander and his friends. According to Hickem, Gordon and Biddle were "talking a lot of smack" to Alexander and being "mouthy." Hickem recalled Gordon shoving Alexander and Alexander telling Gordon to "get out of my face." Hickem testified Alexander "carries a cane because he is disabled." But she told the jury she did not see Alexander hit Gordon with the cane, though she saw Gordon's head was bleeding.

The left side of Gordon's forehead swelled to the size of a golf ball, and a laceration over his over his left eye required eight stitches on the outside and six on the inside. Officer Darin Miller interviewed Gordon at the hospital. The officer received information the wooden cane broke during the altercation. He traveled to the park to search for the broken piece but was unable to find it.

On September 21, 2011, the State prepared a trial information charging Alexander with assault with a dangerous weapon, an aggravated misdemeanor, in violation of Iowa Code section 708.2(3). Alexander pleaded not guilty, and on December 30, 2011, filed a notice he intended to rely on a justification defense. Trial began on February 27, 2012, and the next day the jury convicted Alexander of assault with a dangerous weapon. On April 12, 2012, the district court sentenced Alexander to one year of imprisonment, suspending all but ten days,

and giving credit for two days served. Alexander received one year of probation, fifty hours of community service, a fine of $625, and was ordered to pay restitution. He timely appealed, alleging trial counsel rendered ineffective assistance.[1]

II. Scope and Standard of Review

We review constitutional claims that counsel rendered ineffective assistance de novo. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). We independently evaluate the totality of the circumstances relating to counsel's conduct. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007).

III. Analysis

Alexander contends his counsel was ineffective for failing to advance a specific challenge in his motion for judgment of acquittal that the State's evidence was insufficient to prove he used a dangerous weapon during the assault. He also alleges counsel performed subpar by not requesting a jury instruction defining "serious injury" as that term is used in the dangerous weapon definition.

The defendant's right to receive effective assistance of counsel is enshrined in the Sixth and Fourteenth Amendments of the United States Constitution, as well as Sections 9 and 10 of Article 1 of the Iowa Constitution. *Clark*, 814 N.W.2d at 567. To succeed on a claim of ineffective assistance of

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[1] The transcript shows the district court sentenced Alexander for assault with a dangerous weapon, but the sentencing order lists the offense as an assault causing injury in violation of 708.1 and 708.2(2). The order of discharge from custody also identifies the offense as "assault causing injury." After Alexander filed his notice of appeal, the court entered a nunc pro tunc order on May 7, 2012, correcting its sentencing order to read that Alexander was found guilty of assault with a weapon in violation of sections 708.1 and 708.2(3).

counsel, a defendant must show that "(1) counsel failed to perform an essential duty; and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Both elements must be shown by a preponderance of the evidence. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

A defendant satisfies the first prong of the ineffective-assistance analysis by showing that "counsel's representation fell below an objective standard of reasonableness." *State v. Madsen*, 813 N.W.2d 714, 724 (Iowa 2012) (quoting *Strickland v. Washington*, 466 U.S 668, 668 (1984)). We ask whether any errors occurred that were so serious that counsel failed to function to the capacity guaranteed by our state and federal constitutions. *State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011). We begin with the presumption that trial counsel's performance was competent and measure the performance objectively, by determining whether the assistance was reasonable, given prevailing professional norms and considering all the circumstances. *Id.*

With respect to the second prong of the analysis, we find a defendant experiences prejudice "if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Madsen*, 813 N.W.2d at 727 (internal quotation marks omitted). A reasonable probability is more than a conceivable likelihood, but rather a substantial likelihood of a different result. *Id.*

A Was Counsel Ineffective for Failing to Challenge the Sufficiency of the Evidence as to Whether the Wooden Cane Was a Dangerous Weapon?

The jury received the following marshalling instruction:

> The State must prove all of the following elements of the crime of Assault with a Dangerous Weapon:
>
> 1. On or about the 7th day of September, 2011, the defendant did an act which was intended to cause pain or injury to Lawrence Gordon.
> 2. The defendant had the apparent ability to do the act.
> 3. The defendant was not acting with justification as defined in Instruction No. 13.
> 4. The defendant used a dangerous weapon as defined in Instruction No. 18 in connection with the assault.

Instruction No. 18 defined "dangerous weapon" as "any sort of instrument or device actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death."

Alexander argues on appeal the State did not prove the wooden cane met that definition. He faults counsel for not raising a substantial evidence question on the dangerous weapon element following the State's case in chief.[2] He contends his attorney's omission resulted in prejudice by way of his conviction and sentence. He asks that we remand the case to the district court for entry of judgment on the lesser-included offense of simple assault.

The State disputes counsel's ineffectiveness, asserting a more specific motion for judgment of acquittal would not have achieved a different result—

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[2] Alexander acknowledges counsel's general motion for judgment of acquittal based on justification did not preserve error on his appellate challenge to proof of the dangerous weapon element of the offense. We agree counsel's general motion failed to preserve error in this regard. *See State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004).

given the evidence of how Alexander actually used the wooden cane and its apparent capabilities.

If counsel had challenged the sufficiency of the evidence for the dangerous weapon element, the court would have reviewed the proof in the light most favorable to the State, including all legitimate inferences and presumptions that may fairly and reasonably be deduced from the record. *See State v. Blair*, 798 N.W.2d 322, 325 (Iowa Ct. App. 2011). A jury verdict must be supported by substantial evidence. *See id.* Substantial evidence is that which could convince a rational fact finder that the accused is guilty beyond a reasonable doubt. *Id.*

To prove Alexander committed an aggravated misdemeanor assault under section 708.2(3), the State had to prove he used a dangerous weapon. Our supreme court has categorized the three alternative definitions of a dangerous weapon as follows: (1) a weapon designed with the primary purpose of inflicting death or injury, (2) a dangerous weapon per se, and (3) a weapon which is dangerous because of the manner in which it is used. *See State v. Ortiz*, 789 N.W.2d 761, 765–67 (Iowa 2010). Alexander's prosecution focused on the third definition—involving actual use of the instrument. *See id.* at 766–67.

Section 702.7 describes that form of dangerous weapon as:

> any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being . . . .

The definition contains two requirements—the first relating to the manner in which the instrument is used, and the second relating to the instrument itself. *Ortiz*, 789 N.W.2d at 767.

The first question, then, is whether we can deduce an intent to cause death or serious injury from the defendant's use of the instrument during a confrontation with the victim. *See State v. Greene*, 709 N.W.2d 535, 538 (Iowa 2006) (holding metal shards were not dangerous weapons when placed under a vehicle's tires, but could be considered dangerous if held in defendant's hand during "a personal confrontation"); *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000) (finding accused possessed dangerous weapon when he stood over his victim, poised to strike with a hollow, three-foot long pipe he referred to as "the asskicker"); *see also State v. Jones*, 817 N.W.2d 11, 22 (Iowa 2012) (affirming court of appeals decision at No. 09-0146, 2011 WL 5444091, at *5 (Iowa Ct. App. Nov. 9, 2011), that a fork was a dangerous weapon when accused held tines to the victim's throat and ordered her to perform oral sex against her will).

The second inquiry is whether the instrument, when so used, is capable of causing death. *Ortiz*, 789 N.W.2d at 767. "Dangerous weapons, in fact, can encompass almost any instrumentality under certain circumstances." *Greene*, 709 N.W.2d at 537.

> Where the issue is whether an assault or a murder has been committed with a deadly weapon, it may be held that a stick, stone, hoe, or any one of many other instruments is a deadly weapon, according to the manner in which it is used, the determination of the lethal nature of the instrumentality being a question of fact for the jury.

Id. (quoting 79 Am. Jur. 2d Weapons & Firearms § 1, at 5 (2002)).

If Alexander's trial counsel had moved for judgment of acquittal challenging the dangerous weapon element, the district court would have acted reasonably in finding substantial evidence supporting both requirements of the

section 702.7 definition at issue. On the intent issue, the State offered credible testimony that Alexander was the aggressor during the encounter at the park. His accusations against Gordon had caused bad blood in their previously friendly relationship. Gordon testified Alexander exited his car with "fists balled up" and walked aggressively toward him, calling him a "fucking snitch." Gordon told the court that when he first approached, Alexander did not have the cane in his hand. It was a fair inference from the record that when Gordon turned away, Alexander retrieved the cane from his car. Biddle testified Alexander raised his cane like a baseball bat, took a few steps toward Gordon, and then swung with all of his might, landing a hard hit just above Gordon's left eye.

The prosecutor summed up Alexander's actions as telling of his intent:

> Now you don't hit another person with a wooden cane on their head being friendly or just horsing around. You hit a person with a wooden cane—as the evidence shows, he cocked all the way back and bored down over the head. That's clear evidence that he intended to harm Mr. Gordon. Blood started leaking from Mr. Gordon's head.

Ample evidence supported the notion that Alexander used the cane in a manner indicating his intent to cause Gordon serious injury or death.

It is a closer question whether the State offered sufficient evidence to show the wooden cane was capable of inflicting death. The State did not offer the cane (or its fragments) as an exhibit at trial, and no witness described the cane's appearance or dimensions. The record merely reflects Alexander carried the wooden cane because of a disability.

Alexander claims the State's evidence was insufficient because no witness opined on the cane's ability to cause death, citing *State v. Dallen*, 452

N.W.2d 398, 399 (Iowa 1990) (finding a BB gun was a dangerous weapon because the medical examiner testified its shot could kill a victim). The State counters on appeal that a fact finder may rely on its "practical experience" when deciding whether an instrument is capable of causing death. *See Ortiz*, 789 N.W.2d at 767 (discussing the lethal capacity of a box cutter); *see also Jones*, 2011 WL 5444091, at *4 (upholding sufficiency of the evidence that fork was dangerous weapon despite no specific evidence being introduced at trial indicating "the particular fork used in this case" was capable of inflicting death).

We tend to agree with Alexander that—in the abstract—it may be speculative for a fact finder to conclude a wooden cane, neither presented nor described at trial, was capable of inflicting death. But in this case the fact finder was assisted in the determination of lethality by exposure to the actual harm wrought by the cane's blow.

Gordon testified to the impact:

> I thought maybe I was [ ] shot, to be honest. I didn't know. But then I felt blood running down my shirt or my face, and then I saw Ms. Biddle screaming. And she looked at me, and I really got alarmed when she looked at me because of the look on her face was terrifying. And I thought I must really be injured pretty bad.

When describing Gordon's reaction to the blow, Biddle testified:

> I saw [Gordon] kind of bend over, grab his head. He came towards the truck. I could tell he was dazed because he went to the driver's side. There was a lot of blood. I told him—he said he needed to go to the hospital. I said, "I will drive."

Four photographic exhibits showed the stitched laceration above Gordon's left eye and swollen knot on his forehead. We conclude the State offered substantial evidence to show the wooden cane, used for support by a man with a disability,

was capable of inflicting death, especially when swung, baseball-bat style, at the victim's forehead. Therefore, counsel was not ineffective for declining to challenge the dangerous weapon evidence. *See State v. Taylor*, 689 N.W.2d 116, 136 (Iowa 2004).

Our conclusion is bolstered by decisions from other jurisdictions holding a cane may be considered a dangerous weapon when used to deliver a single blow to the victim's head. *See, e.g.*, *People v. Lee*, 360 N.E.2d 1173, 1176 (Ill. App. Ct. 1977) (holding walking cane was transformed into dangerous weapon when used to strike victim over the head); *State v. Knight*, 289 P. 1053, 1054 (Ore. 1930) (holding hardwood, leaded cane or walking stick, when striking victim's head or face during "quarrel between two old men" was "capable of producing death or great bodily harm," and jury was entitled to assume cane resembled those generally used); *Collins v. State*, 210 P.2d 285, 287 (Okla. Crim. App. 1922) (holding wooden cane was dangerous weapon when single blow to the head caused victim to bleed profusely and later die; autopsy revealed skull fracture and large clots of blood at brain base); *Campbell v. State*, 86 N.W. 855, 857–58 (Wis. 1901) (finding blow by cane, though relatively light weight of thirteen ounces, "caused the deceased to stagger" and could be cause of decedent's skull fracture); *see also United States v. Loman*, 551 F.2d 164, 169 (7th Cir. 1977) (finding district court properly characterized walking stick—used to strike victim once in the back and once on the jaw, with such force that it broke—as a dangerous weapon).

B. Was Counsel Ineffective for Failing to Request an Instruction Defining Serious Injury?

Alexander next contends his attorney rendered ineffective assistance by failing to request a jury instruction defining "serious injury" as set out in Instruction No. 18. Alexander acknowledges the issue at hand is his intent in using the cane and not Gordon's actual injuries. But he argues the injuries sustained by Gordon "shed light" on Alexander's intent.[3]

The State asserts the jury was adequately instructed on the applicable law. It argues even if trial counsel had a duty to request an instruction defining serious injury, Alexander was not prejudiced by the omission.

Iowa Code section 702.18 defines a serious injury, in part, as:

> a. Disabling mental illness.
> b. Bodily injury which does any of the following:
> (1) Creates a substantial risk of death.
> (2) Causes serious permanent disfigurement.
> (3) Causes protracted loss or impairment of the function of any bodily member or organ.

We doubt a juror would be aware of what constituted a "serious injury" absent an instruction explaining the term. But even if counsel had sought and received an instruction defining serious injury, we see no reasonable probability the jury would have reached a different outcome.

Instruction No. 18 asks not whether Gordon's injury was serious but whether Alexander used his cane "in such a way to indicate [Alexander] intended

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[3] Alexander invokes a letter written by a juror to the trial judge after the verdict was returned, questioning the defendant's "intent for serious injury." We do not consider the juror's reflections. Jurors are not allowed to impeach their own verdict; jurors' reflections inhere in their verdict. *See* Iowa R. Evid. 5.606(b); *see also State v. Folck*, 325 N.W.2d 368, 372 (Iowa 1982).

to inflict death or serious injury." A serious injury includes a bodily injury that "[c]reates a substantial risk of death." Iowa Code § 702.18. A substantial risk of death is more than just any risk of death but does not mean death is likely. *State v. Carter*, 602 N.W.2d 818, 821 (Iowa 1999). If a real hazard or danger of death exists, a serious injury is established. *Id.*

Alexander's confrontational demeanor toward Gordon, his act of arming himself with the cane, his batter-like swing at Gordon's head with an instrument capable of causing death, and the blow hard enough to crack the cane and lacerate Gordon's forehead, all combine to allow the inference that Alexander used the cane in a manner indicating his intent to cause death or serious injury. Alexander cannot establish it was reasonably probable that, equipped with a definition of serious injury, the jurors would have determined the cane was not a dangerous weapon after all. Accordingly trial counsel was not ineffective for failing to request the definitional instruction.

AFFIRMED.